

an award of permanent partial general disability based on a 10 percent functional impairment.

On appeal, respondent contends claimant failed to prove she sustained a work-related accidental injury on December 13, 1994. Furthermore, respondent contends claimant failed to prove she provided respondent with timely notice and timely written claim for the December, 13, 1994, accident. Also, respondent argues, if the December 13, 1994, accidental injury is found to be compensable, claimant failed to prove that she suffered a permanent injury as a result of the accident.

Claimant, on the other hand, contends she met her burden of proof on all of the various conditions necessary for an award of compensation. Therefore, the claimant requests the Appeals Board affirm the 10 percent permanent partial general disability award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

Claimant's Application for Hearing was filed on November 20, 1995, and claimed she injured her low back in two separate work-related accidents, one on September 1, 1993, and the other on December 13, 1994. At the regular hearing, claimant made a further claim for a work-related accident occurring in early 1994. The Administrative Law Judge found that claimant had proven all the various conditions needed to establish her right to an award of compensation for the December 13, 1994, accident.

The Appeals Board agrees with the Administrative Law Judge that the claimant proved she suffered a work-related accidental injury on December 13, 1994. Claimant did prove she gave respondent timely notice of a December 13, 1994, accident and also served respondent with timely written claim for compensation. But, the Appeals Board concludes claimant failed to prove the December 13, 1994, accident resulted in a separate permanent injury or a permanent aggravation of a preexisting low-back injury. This conclusion is supported by the fact that, after the December 13, 1994, accident, claimant did not request respondent to provide any medical treatment for her low-back complaints. Further, claimant testified, within two weeks after the December 13, 1994, accident, her low-back condition returned to the same condition as it was before the accident.

Two physicians testified in this case, claimant's treating physician, Pandu P. Chillal, M.D., and Philip R. Mills, M.D., a physician who evaluated and examined claimant at her attorney's request.

Dr. Chillal expressed two separate permanent function impairment ratings for claimant's low-back injury in two letters to claimant's attorney, one dated April 4, 1997, and the other dated April 16, 1997. In the April 4, 1997, letter, Dr. Chillal opined, "Percent of disability is probably less than ten percent. There is no real anatomical damage demonstrable at this point." In the April 16, 1997, letter, the doctor opined, "1. Apparently, I do not think she has any permanent damage at this point. 2. The amount of damage has already been assessed somewhere between fifteen to twenty percent. 3. She had a right-sided lumbar radiculopathy, and I believe this should be enough information for you."

During Dr. Chillal's deposition testimony, he was asked to clarify his opinions on claimant's permanent functional impairment. He testified, if claimant has a permanent functional impairment, it would currently be 10 percent or less. He further testified that the permanent functional impairment may turn out to be 5 percent or zero in the next six to twelve months. The doctor also indicated he referred to an unspecified edition of the AMA Guides in formulating his permanent partial impairment opinion, but he "didn't sit and do a reference, you know; but I do it every day so - in my head so--." Furthermore, Dr. Chillal's medical records indicate that the last time he treated claimant for low-back complaints in 1994 was on November 29, 1994, before the December 13, 1994, accident. He then did not see claimant again for low-back complaints until September of 1996.

The Appeals Board finds that Dr. Chillal's permanent impairment of function opinion is not persuasive and can not be considered in determining claimant's permanent functional impairment. Regardless of which date of accident is determined that claimant sustained a low-back injury, Dr. Chillal's permanent function impairment rating is questionable because he is not sure claimant's injury is permanent and his opinion varies extensively from zero to 20 percent. Additionally, after the December 13, 1994, accidental injury, Dr. Chillal did not treat claimant again until 1996. Therefore, Dr. Chillal's opinion is based on claimant's condition before the December 13, 1994, injury and two years after the December 13, 1994, injury. Dr. Chillal also did not identify the specific edition of the AMA Guides he used to determine the functional impairment rating and based on his testimony it is questionable if he did utilize the AMA Guides to determine the rating.

Dr. Mills saw claimant on one occasion, February 23, 1998, over three years after her December 13, 1994, accident. Dr. Mills utilized the AMA Guides in determining claimant's permanent functional impairment but used the Fourth Edition instead of the Third Edition (Revised) as required by the statute in effect on all three of claimant's alleged dates of accident.¹ Furthermore, the history claimant provided Dr. Mills only described the work-related low-back injury that claimant sustained on September 1, 1993, and then the increased symptoms that occurred at work in 1994 after she returned to work following hysterectomy surgery. At Dr. Mills' deposition, claimant's attorney also provided Dr. Mills

¹See K.S.A. 44-510e(a).

with the same history as claimant had given him during the February 23, 1998, examination. Dr. Mills was never given a history of claimant injuring her back at work on December 13, 1994.

Therefore, the Appeals Board finds that Dr. Mills' permanent functional impairment opinion is only related to claimant's September 1, 1993, and early 1994 accident dates and not to the December 13, 1994, accident date.

At the regular hearing, claimant introduced a Claim for Workers Compensation form served on the respondent on January 25, 1995, for the December 13, 1994, accident. This written claim satisfies the statutory requirement of serving a written claim for compensation on the respondent within 200 days from the December 13, 1994, accident date.² But claimant did not present any evidence or any argument that a written claim was timely served on the respondent for the other two dates of accident.

The Appeals Board finds the claimant did not serve a timely written claim on the respondent for either the September 1, 1993, or the early 1994 accident date. Therefore, the Appeals Board concludes that claimant is barred from recovering workers compensation benefits for either of those dates of accident.

Likewise, the Appeals Board concludes that claimant failed to prove she suffered a permanent injury or permanently aggravated a preexisting injury as a result of the December 13, 1994, accident. Accordingly, the Appeals Board finds that claimant should be and is denied her claim for workers compensation benefits for the alleged December 13, 1994, accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's February 5, 1999, Award should be, and is hereby, reversed, and claimant is denied her request for workers compensation benefits for alleged work-related accidents of September 1, 1993, early 1994, and December 13, 1994.

The Administrative Law Judge's order listing the administration expenses to be assessed against the respondent is adopted by the Appeals Board.

IT IS SO ORDERED.

²See K.S.A. 44-520a.

Dated this ____ day of October 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert L. Nicklin, Wichita, KS
Janell Jenkins Foster, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director